BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Policies and Rules for the	)	IB Docket No. 98-21
Direct Broadcast Satellite Service	)	

COMMENTS OF TIME WARNER CABLE

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SUMMARY

There is absolutely no evidence or valid legal justification to support adoption of a cable/DBS cross-ownership ban. Since 1982, a cable/DBS cross-ownership ban has been extensively considered and rejected three times, and there have been no changes in circumstances that would warrant reversal of this long standing policy. Furthermore, a complete cable/DBS cross-ownership ban is far too extensive a restriction on cable operators' freedom of speech to survive scrutiny under a First Amendment legal analysis. While enhancement of video competition may be a valid government interest, an outright cable/DBS cross-ownership ban that grossly infringes upon the cable operators' First Amendment rights is clearly not the least restrictive means to accomplish this goal.

Furthermore, there is simply no record evidence to justify a predictive judgment in this regard. To the contrary, developments over the past two decades clearly demonstrate that cable-affiliated participation in DBS has benefited the public interest. PRIMESTAR's success as a medium-power DBS provider demonstrates that a cable-affiliated DBS provider can be an aggressive competitor to all MVPDs, including other DBS providers, independent cable operators, and DBS-affiliated cable operators, and there is not one scintilla of evidence of any past anticompetitive behavior arising from PRIMESTAR's ownership structure. The PRIMESTAR consent decree clearly demonstrates that a less restrictive means of protecting against any specific presumed harms is readily available. Furthermore, the Commission will always be able to review any DBS license transfer application on a case-by-case basis to fashion narrowly-tailored conditions to achieve its pro-competitive objectives.

To the extent that the Commission believes, despite the utter lack of record evidence, that a DBS provider owned by a cable company might compete less vigorously in those areas where it operates cable systems, then any DBS/cable ban should only apply to situations where a single cable company exercises de jure control over the DBS licensee. When the management of the potential DBS operator is completely and totally separate from that of its cable owners and the equity structure ensures that all shareholders' interests are properly represented, the Commission should not restrict ownership of the DBS operator merely because cable operators are investors. Indeed, given the proven track record of consumer benefits flowing from the ability of any television viewer to choose among numerous options for multichannel video service, including PRIMESTAR, the Commission should actively encourage any investment by cable operators or others that will make a potential DBS service a more viable competitor.

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COMMENTS OF TIME WARNER CABLE

Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P. ("TWE"), hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above referenced proceeding (the "*Notice*").[1] Time Warner operates cable television systems across the United States, and affiliates of TWE, together with its partner Advance/Newhouse, hold a combined 30 percent equity interest in PRIMESTAR, Inc. ("PRIMESTAR").[2]

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[1]*In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, IB Docket No. 98-21 (rel. February 26, 1998).

[2]As the Commission is aware, in April 1998 PRIMESTAR was restructured from a limited partnership into a corporation. PRIMESTAR is awaiting Commission action on its applications involving high-power DBS licenses. On July 18, 1997, PRIMESTAR filed an application seeking to acquire control of Tempo Satellite, Inc., which holds an authorization for 11 high-power DBS channels at both 119° W.L. and 166° W.L. *See Application of TCI Satellite Entertainment, Inc. And PRIMESTAR, Inc., for Transfer of Control of Tempo Satellite, Inc.*, File No. 91-SAT-TC-97. In addition, on August 15, 1997, PRIMESTAR filed an application seeking to acquire certain assets of the News Corp and MCI Telecommunications, Inc. joint venture that includes a DBS license for 28 channels at 110° W.L. *See Application of MCI Telecommunications Corporation and PRIMESTAR LHC, Inc., for Consent to Assignment of Direct Broadcast Satellite Authorizations*, File No. 106-SAT-AL-97.

I. There Have Been No Changes In Circumstances To Warrant Imposition Of A Cable/DBS Cross-Ownership Ban.

The Commission has specifically addressed the issue of a cable/DBS cross-ownership ban no fewer than three times since 1982, and has never imposed such a restriction on the control or ownership of DBS licenses. In fact, this very issue was addressed less than two and one half years ago when the Commission declined to bar cable-affiliated entities from bidding for the last available full-CONUS DBS slot. There have been no changes in circumstances that would warrant reversal by the Commission of its long standing policy and imposing a cable/DBS cross-ownership ban.

As the Commission has observed in its *Notice,* there has never been a cable/DBS cross-ownership ban.[3] In fact, the only ownership restriction ever placed on DBS was a "one-time" restriction requiring divestiture within one year by the successful bidder for the 110° W.L. slot of any attributable interest in any channels at either of the other two full-CONUS slots.[4] The Commission applied this restriction to all potential DBS licensees, not just those affiliated with cable companies. Even before any DBS service had been launched, both Congress and the Commission dismissed the need for a cable/DBS cross-ownership ban. Instead, both Congress

[3] *Notice* at ¶¶ 55-56.

[4] *Id.* Although this restriction is no longer applicable, Time Warner understands that PRIMESTAR has offered to divest its DBS authorization at 119° W.L. as a condition of the Commission's grant of its application relating to the 110° W.L. slot.

and the Commission determined that the existing antitrust laws would provide adequate protection against potential anticompetitive behavior.[5]

The Commission first addressed the possibility of a cable/DBS cross-ownership ban on June 1, 1981, when it issued a *Notice of Proposed Policy Statement and Rulemaking Notice* to consider proposed policies and rules to govern the authorization of DBS service prior to the 1983 Regional Administrative Radio Conference ("RARC-83 ").[6] After full consideration of the comments and reply comments filed in response to the *Notice of Proposed Policy Statement and Rulemaking Notice*, on July 14, 1982, the Commission released its *Report and Order*, in which it concluded that multiple-ownership restrictions for DBS licensees are unnecessary.[7]

In reaching its determination that a multiple-ownership restriction, including a cable/DBS cross-ownership ban, was not warranted, the Commission concluded as follows:

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[5]Congress declined to adopt a Senate proposal that would have required the Commission to adopt cross-ownership restrictions for DBS systems and limitations on vertical integration of DBS systems. H.R. Conf. Rep. No. 102-862, 102d Cong. 2d Sess. (1992). Furthermore, in the Telecommunications Act of 1996, the Congress specifically requires the Commission to review all of its ownership rules biennially as part of its regulatory reform review under Section 11 of the Communications Act of 1934, as amended. Section 11 requires the Commission to eliminate regulations that its determines are no longer in the public interest. 47 U.S.C. 201. Section 11 clearly contemplates that the Commission would only be eliminating, and not adding, regulations. Clearly, the Congress has stated a strong presumption against new cross-ownership bans.

[6]*Inquiry into the Development of Regulatory Policy in regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference* (Notice of Proposed Policy Statement and Rulemaking Notice), 86 FCC 2d 719 (1981).

[7]*Inquiry into the Development of Regulatory Policy in regard to Direct Broadcast Satellites for the Period Following the 1983 Regional Administrative Radio Conference* (Report and Order), 90 FCC 2d 1341, ¶ 91 (1982).

> Provision of satellite services does not appear to exhibit the increasing returns to scale that might lead to domination of the market by a single supplier, and, in fact, the current domestic satellite industry consists of several suppliers. Thus, we expect considerable competition among DBS systems . . . . If a large number of DBS channels proves viable, we expect that several DBS operators will compete among themselves and with terrestrial suppliers to provide video services. In any case, existing antitrust laws would provide adequate protection against possible abuses of market power due to horizontal concentration of control.[8]

History has borne out the Commission's expectation regarding the viability of a large number of DBS channels offered by numerous competing providers. Moreover, assuming the grant of PRIMESTAR's pending applications, the DBS business will become substantially more competitive, given both PRIMESTAR's exemplary record of competing vigorously as a medium-power service and its incentive to compete aggressively at high power. Without PRIMESTAR's entry as a high-power DBS provider, the current high-power DBS providers will continue to enjoy the duopoly that exists today.[9] Nonetheless, the same antitrust laws exist today that Congress and the Commission relied upon years ago to protect against possible unlawful activities.

The Commission addressed the issue of cable-affiliated DBS providers for the second time in 1992 when it approved the application for a high-power DBS license by TEMPO

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[8]*Id.* at ¶ 95.

[9]While there are currently three high-power DBS operators, DirecTV, USSB, and EchoStar, DirecTV and USSB provide their services from the same satellite, use the same receiving equipment, and intentionally market their services to complement each other. As such, the high-power DBS arena effectively operates as a duopoly. There are no viable alternatives to PRIMESTAR as a third supplier of high-power DBS service in a reasonable period of time.

Satellite, Inc. ("TEMPO"). In granting a DBS authorization to TEMPO, a wholly owned subsidiary of TeleCommunications, Inc., the largest cable system operator in the United States, the Commission found that "TEMPO's participation [in the DBS industry] could well accelerate the initiation of DBS service by bringing valuable marketplace experience and presence and possibly enhancing access to programming."[10] The Commission again relied upon antitrust laws noting that "existing antitrust law and Commission oversight are sufficient to prevent any conduct that is illegal or deleterious to the DBS industry and its customers, or to operators and customers in the other video entertainment distribution industries as well."[11] The Commission reasoned that the entry of an experienced MVPD provider into the high-power DBS arena would benefit the public interest.

The Commission considered a cable/DBS cross-ownership ban for a third time less than two and one half years ago. On December 15, 1995, the Commission issued an order amending the rules and policies for DBS service.[12] Once again, the Commission specifically declined to impose a cable/DBS cross-ownership ban. The Commission stated that:

> Even if a cable-affiliated MVPD with market power were to acquire the permit for the full-CONUS channels available at 110°, two other full-CONUS locations -- largely occupied by independent DBS providers -- would remain. The presence of these other providers severely constrains the strategic activities of

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[10]*TEMPO Satellite, Inc. (TEMPO II)* (Memorandum Opinion and Order), 7 FCC Rcd 2728, ¶ 10 (1992) (footnotes omitted) (quoting *Continental Satellite Corporation*, 4 FCC Rcd 6292 (1989)).

[11]*Id.*

[12]*Revision of Rules and Policies For the Direct Broadcast Satellite Service* (Report and Order) ("*Auction Order*") 11 FCC Rcd 9712 (1995).

> an MVPD-DBS combination, since even if it chooses not to make full use of its DBS channels, consumers will have at least two other competitive sources of DBS service from which to choose. Moreover, we have recognized that cable-affiliated MVPDs bring certain positive attributes as DBS permittees.[13]

The Commission also noted that allowing cable participation in DBS was consistent with the policy established in TEMPO II just a few years earlier.[14]

Accordingly, the Commission declined to prohibit cable-affiliated entities from acquiring the license for the last of three full-CONUS DBS slots available in the United States. The Commission concluded that it was in the public interest to permit a cable-affiliated entity to acquire the 110° W.L. DBS authorization. Absolutely nothing has changed that would allow the Commission to reverse its position.[15]

In addition, the Commission has a stated policy of relying on antitrust enforcement to protect against anticompetitive behavior. As demonstrated by the Department of Justice's review of the proposed PRIMESTAR/MCI transaction, the enforcement of the antitrust laws serves as a double check to ensure that cable-affiliated DBS control is not anticompetitive. As noted by Commissioner Powell in his separate statement to the *Notice,* the Commission is "not the only agency with power and expertise to act in this area. The Department of Justice has

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[13]*Id.* at ¶ 73 (footnote omitted).

[14]*Id.* at ¶ 74.

[15]It is axiomatic that an agency choosing to alter its regulatory course "must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored." *Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2233, 29 L. Ed. 2d 701 (1971); accord *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983).

adequate authority and an admirable record in evaluating and blocking anticompetitive combinations." Therefore, the Commission should not institute a general cable/DBS cross-ownership ban.

II. A Blanket Cable/DBS Cross-Ownership Ban Would Violate The First Amendment.

The Supreme Court has unequivocally held that cable operators engage in and transmit speech and are therefor entitled to the full protection of the First Amendment.[16] A complete cable/DBS cross-ownership ban could not withstand any recognized legal standard of scrutiny under the First Amendment, and therefor must not be adopted. First and foremost, such a ban could not withstand strict scrutiny because such a ban would absolutely foreclose the ability of a particular group of MVPDs to engage in a certain type of Constitutionally protected communication. In addition, a cable/DBS cross-ownership ban is far too extensive a restriction on cable operators' freedom of speech to survive under intermediate scrutiny as set forth in United States v. O'Brien.[17] The Supreme Court's standard under O'Brien requires that a government restriction on First Amendment freedoms be no greater than necessary to the furtherance of the government interest underlying the restriction.[18] In this proceeding, the Commission has stated that the purpose of the proposed ban is to curb potential competitive abuses by the cable industry. While enhancement of video competition may be a sufficient

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[16] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622; 514 (1994) (citing *Leathers v. Medlock*, 499 U.S.439, 444 (1991).

[17] 391 U.S. 367 (1968).

[18] Id. at 377.

government interest under O'Brien, an absolute cable-DBS cross-ownership ban cannot be said to be the least restrictive means to accomplish this goal, and there is simply no record evidence available to justify a predictive judgment in this regard.

In fact, developments since the Commission's *Auction Order* clearly demonstrate that cable-affiliated participation in DBS has benefited the public interest. PRIMESTAR's success as a medium-power DBS provider demonstrates that a cable-affiliate DBS provider can be an aggressive competitor to all MVPDs, including DBS providers, independent cable operators, and DBS-affiliated cable operators. There is not one scintilla of evidence in this proceeding, or in the PRIMESTAR proceedings, of past anticompetitive behavior by PRIMESTAR. PRIMESTAR's owners have not refused to sell programming to competing DBS providers nor have they refused to sell the PRIMESTAR service in areas served by commonly owned cable systems. Moreover, a federal consent decree serves as an additional layer of protection against any hypothetical abuses that might be cited as justification for an outright DBS/cable cross-ownership ban. Unlike a cross-ownership ban, this consent decree is narrowly targeted to address clearly articulated (albeit hypothetical) competitive concerns. However, the consent decree approach is only minimally intrusive on cable operator First Amendment freedoms.[19]

Without evidence of changed circumstances in the future, an outright ban is clearly over broad and unnecessary.[20] The consent decree demonstrates that a less restrictive means

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[19]In the meantime, of course, the PRIMESTAR consent decree has been rendered essentially superfluous by the enactment of Sec. 628 of the Act.

[20]*See Home Box Office v. FCC*, 567 F.2d 9, 13 (D.C. Cir. 1977) (holding that a Commission restriction of cable operators' First Amendment freedoms based merely on (continued...)

of protecting against anticompetitive behavior is readily available. In addition, the Commission can review any DBS license transfer application on a case-by-case basis to fashion narrowly-tailored conditions to achieve its pro-competitive objectives. Therefore, an outright cable/DBS cross-ownership ban that grossly infringes upon the cable operators' First Amendment rights would be unconstitutional.

III. The Matter Of DBS Cross-Ownership Can More Efficiently Be Evaluated On A Case-By-Case Basis.

As demonstrated by the Commission's review of the currently pending PRIMESTAR applications, the unique circumstances surrounding DBS cross-ownership are best addressed on a case-by-case basis. Each case of DBS cross-ownership will present unique and different circumstances for the Commission to address -- in fact the Commission will continue to face these unique DBS ownership issues even if a general rule is adopted. Therefore, a general rule would not result in any greater efficiency for either the Commission or the applicant, nor would it result in any greater predictability and consistency.

In addition, as noted in Separate Statements by Commissioners Furchtgott-Roth and Powell, due to the limited number of high-power DBS orbital slots allocated to the United States by international treaty, it is unlikely that the Commission will be presented with any significant number of DBS cross-ownership cases. As demonstrated by the PRIMESTAR restructuring, the great expense associated with starting a DBS operation creates incentives for most future DBS licensees to be consortiums of entities joined together to share the risks of

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[20](...continued)
speculation and without reference to a factual basis is by its very nature over broad and fails First Amendment scrutiny under the *O'Brien* standard.)

start-up and their individual expertises. Therefore, it is likely that the ownership of future DBS licensees will become increasingly complicated, rendering a general rule unduly rigid and unable to account for unique situations. As such, there is no need for a general rule regarding DBS cross-ownership, when such a rule would be of extremely limited value, if any.

Furthermore, less than two and one half years ago, the Commission concluded that it was appropriate to retain regulatory flexibility in monitoring DBS channel aggregation by reviewing ownership structures on a case-by-case basis. In establishing the one-time DBS auction rules, the Commission noted that:

> We do recognize that, in the future, one or more of the current unaffiliated full-CONUS DBS operators may seek to assign or transfer control over its license to a cable-affiliated MVPD. The Commission has authority under Title III to approve, reject, or condition the assignment or transfer of DBS channels to other firms and in the event a cable firm or consortium desires to acquire any additional channels, the competitive effect of that transfer in the MVPD market will be a significant issue in that transaction, as it was in approving TEMPO's application. Because such transaction would require Commission approval we would be in a position to assess the competitive landscape if and when such a transaction was proposed, and to grant, deny, or condition authorization as appropriate under the circumstances at that time. Thus, as advocated by EchoStar/Directsat and DBSC among others, we will be able to monitor DBS channel aggregation on a case-by-case basis and retain the flexibility to take appropriate action under the circumstances.[21]

There has been no change in circumstance that would warrant reversal of the Commission's longstanding policy reversing itself and restricting its flexibility to respond to individual DBS ownership proposals on a case-by-case basis.

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[21] *Auction Order* at ¶ 76.

IV. Any Cable/DBS Cross-Ownership Restrictions Must Be Narrowly Tailored.

As noted above, an across-the-board cable/DBS cross-ownership ban would be overbroad and thus would violate the First Amendment. Accordingly, if the Commission chooses to reverse the well-established FCC and Congressional determinations that a cable/DBS cross-ownership ban is unnecessary and instead elects to eschew the flexibility inherent in reviewing the ownership structure of DBS license applicants on a case-by-case basis, any such restrictions must be carefully drawn and narrowly tailored to address clearly articulated harms. Hence, to the extent that the Commission believes, despite the utter lack of record evidence, that a DBS provider owned by a cable company might compete less vigorously in those areas where it operates cable systems, then any DBS/cable ban should only apply to situations where a single cable company exercises de jure control over the DBS licensee.

As fully discussed in PRIMESTAR's *Memorandum Summarizing Petitioners' Arguments and Responses Thereto,* filed January 23, 1998, a DBS operator that is organized as an independently managed, publicly traded corporation provides the legal safeguards necessary to protect against any efforts to favor or protect cable systems operated by non-controlling cable-affiliated shareholders. When the management of the potential DBS operator is completely and totally separate from that of its cable owners and the equity structure ensures that all shareholders' interests are properly represented, the Commission should not restrict ownership of the DBS operator merely because cable operators are investors.[22] Indeed, given

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[22]Of course, it is well-established that the Commission will not rely upon mere

(continued...)

the proven track record of consumer benefits flowing from the ability of any television viewer to choose among numerous options for multichannel video service, including PRIMESTAR, the Commission should actively encourage any investment by cable operators or others that will make PRIMESTAR a more viable competitor to cable systems, the current high power DBS duopoly, and other MVPDs, so long as no single cable operator exercises de jure control over PRIMESTAR.

Conclusion

The Commission should not impose a general rule banning cable/DBS cross-ownership. The Commission has reviewed the need for a cable/DBS cross-ownership ban several times since DBS was first authorized and has never imposed such a restriction. There have been no changes in circumstances that would warrant reversal by the Commission of its long standing policy and imposition of a cable/DBS cross-ownership ban. In fact, intervening developments since the Commission's *Auction Order* demonstrate that a cable-affiliated DBS provider would

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[22](...continued)
speculation of future anticompetitive or unlawful acts. See Stockholders of *CBS Inc. And Westinghouse Electric Corp.*, 11 FCC Rcd 3733, ¶¶27-30 (1995), recon. Dismissed, 11 FCC Rcd 19746 (1996) (refusing to condition transfer of control of CBS to Westinghouse, based upon allegation that transferee would influence news reporting because it was a "conglomerate" with private interests); *WGPR, Inc. and CBS, Inc.*, 10 FCC Rcd 8140, ¶¶16-19 (1995) (rejecting speculation that assignee would, in practice usurp control of station pursuant to local marketing agreement); *Applications of Waterway Communications Systems, Inc.*, 2 FCC Rcd 7317 (1988) (refusing to deny renewal application based upon speculation regarding the potential for future interference, absent any complaint); *see also, Turner Broadcasting System, Inc. and Time Warner Inc.*, 11 FCC Rcd 19595, ¶ 34 (1996) (refusing to impose conditions upon or deny transfer of control based upon concerns regarding future programming practices, absent any current evidence of refusal to sell).

bring valuable experience to the high-power DBS arena and also increase competition. Therefore, the Commission should not impose a blanket cable/DBS cross-ownership ban.

Instead, the ownership structure of each DBS license applicant should be addressed on a case-by-case basis. As demonstrated by the Commission's review of the currently pending PRIMESTAR applications, the ownership of DBS operators is becoming increasing complicated. As such, a general rule of limited applicability will be inadequate. To the extent the Commission does determine that a cable/DBS cross-ownership ban is necessary to protect the public interest, such a ban should be limited to prohibiting a single cable operator from exercising de jure control over a DBS licensee. This approach limits any potential "pro-cable" behavior while permitting beneficial cable-affiliated participation in high-power DBS. Furthermore, a complete cable/DBS cross-ownership would violate a cable operator's First Amendment right to freedom of speech.

Respectfully submitted,

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